STATE OF MICHIGAN

IN THE SUPREME COURT

(Appeal from the Court of Appeals)

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| CYNTHIA A. PAPP | SC: 121596 |
| Plaintiff/Appellee, | COA: 238543 |
| V | Kent County Circuit Court<br>Case No. 99-08377-NI |
| VICKIE MASON and SCOTT MASON, | |
| Defendants/Appellants. | |

_____/

# BRIEF ON APPEAL
# PLAINTIFF/APPELLEE CYNTHIA A. PAPP

## ORAL ARGUMENT REQUESTED

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## STATEMENT OF THE BASIS OF JURISDICTION

PLAINTIFF-APPELLEE, CYNTHIA A. PAPP, STATES THAT THE JURISDICTIONAL SUMMARY AND THE STANDARDS OF REVIEW STATED IN THE APPELLANTS' BRIEF ARE COMPLETE AND CORRECT.

## COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. WHAT LANGUAGE MUST BE INCLUDED IN AN AGREEMENT TO MAKE IT A STATUTORY, RATHER THAN A COMMON LAW, ARBITRATION AGREEMENT?

DEFENDANTS-APPELLANTS FAILED TO ANSWER THE QUESTION AS FRAMED BY THIS COURT'S ORDER, OF MARCH 26, 2003, GRANTING LEAVE TO APPEAL.

PLAINTIFF-APPELLEE FAILED TO ANSWER THE QUESTION AS FRAMED BY THIS COURT'S ORDER, OF MARCH 26, 2003, GRANTING LEAVE TO APPEAL.

COURT OF APPEALS FAILED TO ANSWER THE QUESTION AS FRAMED BY THIS COURT'S ORDER, OF MARCH 26, 2003, GRANTING LEAVE TO APPEAL.

II. DID THE COURT OF APPEALS CORRECTLY FIND THE STIPULATION AND ORDER TO BE A COMMON LAW ARBITRATION AGREEMENT?

DEFENDANT-APPELLANTS ANSWER "NO".

PLAINTIFF-APPELLEE ANSWERS "YES".

COURT OF APPEALS ANSWERS "YES".

III. SHOULD COMMON LAW ARBITRATION AGREEMENTS BE UNILATERALLY REVOCABLE?

DEFENDANT-APPELLANTS ANSWER "NO".

PLAINTIFF-APPELLEE ANSWERS "YES".

COURT OF APPEALS ANSWERS "YES".

## COUNTER-STATEMENT OF FACTS

Appellee accepts the Appellants' Statement of Facts, except for Appellants' concluding paragraph contained in the paragraph captioned "Appellate Proceedings" and found on page 3 of Appellants' Brief. Appellants' statement is a request for relief not a statement of fact and does not conform to the statement of fact requirements of MCR 7.213 (C) (6) as incorporated by MCR 7.306 (A).

## ARGUMENT

### I. WHAT LANGUAGE MUST BE INCLUDED IN AN AGREEMENT TO MAKE IT A STATUTORY, RATHER THAN A COMMON LAW, ARBITRATION AGREEMENT?

### A. Standard of Review

The elements required to establish either a legally sufficient statutory arbitration agreement or a legally sufficient common law arbitration agreement are questions of law, which are reviewed on appeal by this Court de novo. *Cardinal Mooney High School v. Michigan High School Athletic Ass'n*, 437 Mich 75,80; 467 NW2d 21 (1991). To establish the applicable language criteria for both statutory and common law arbitration agreements, statutory construction is required and this also is reviewed on appeal by this Court de novo. *Cruz*

*v. State Farm Mutual Automobile Insurance Co.*, 466 Mich 588, 594; 648 NW2d 591 (2002).

## B. Analysis and Argument

Statutory arbitration agreements are governed by statute. MCL 600.5001 provides as follows:

> Sec. 5001. (1) **Parties.** All persons, except infants and persons of unsound mind, may, by an instrument in writing, submit to the decision of 1 or more arbitrators, any controversy existing between them, which might be the subject of a civil action, except as herein otherwise provided, and may, in such submission, agree that a judgment of any circuit court shall be rendered upon the award made pursuant to such submission.
>
> (2) **Enforcement; rescission.** A provision in a written contract to settle by arbitration under this chapter, a controversy thereafter arising between the parties to the contract, with relation thereto, and in which it is agreed that a judgment of any circuit court may be rendered upon the award made pursuant to such agreement, shall be valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the rescission or revocation of any contract. Such an agreement shall stand as a submission to arbitration of any controversy arising under said contract not expressly exempt from arbitration by the terms of the contract. Any arbitration had in pursuance of such agreement shall proceed and the award reached thereby shall be enforced under this chapter.
>
> (3) **Collective labor contracts excepted.** The provisions of this chapter shall not apply to collective contracts between employers and employees or associations of employees in respect to terms or conditions of employment.

MCL 600.5021. provides as follows:

> Sec. 5021. **Arbitration agreements; conduct of arbitration.** The arbitration shall be conducted in accordance with the rules of the supreme court.

For purposes of brevity, the above quoted statutes are hereinafter collectively referred to as the "Act".

A review of the Act and Michigan case law establishes that in order to have a valid, enforceable and irrevocable statutory arbitration agreement under the Act, the agreement must include the following:

(a) a written contract to settle by arbitration;
(b) reference in the contract that the arbitration is governed by the Act;
(c) a controversy existing between the parties or a controversy thereafter arising between the parties to the contract;
(d) the contract must provide that a judgment of any circuit court may be rendered upon an award made pursuant to the agreement; and
(e) the arbitration shall be conducted in accordance with the rules of the supreme court.

Failure to include all required provisions of the Act into an agreement to arbitrate renders and otherwise reduces the agreement to a common law arbitration agreement. As stated by the Court in *Whitaker v. Giem*, 85 Mich App 511; 271 NW2d 296 (1978):

> "The first issue to be resolved on appeal is whether the arbitration agreement contracted for by the parties was statutory or common-law arbitration. Plaintiff admits that statutory arbitration procedures were not followed but denies that

> statutory arbitration was intended. Defendants claim that statutory arbitration was intended. It is clear that arbitration was intended by both parties as the method to resolve the dispute. Where an agreement to arbitrate is found not to be in conformity with statutory requirements, it will be held to be a common law arbitration agreement. *Frolich v. Walbridge-Aldinger Co.*, 236 Mich 425, 429, 210 NW 488 (1926), *Stadel v. Granger Brothers, Inc.*, 4 Mich App 250, 258, 144 NW2d 609 (1966). Moreover, the fact that the trial court did not reach the issue of whether the arbitration was statutory or common law is insignificant since the result of a defective statutory arbitration is a common-law arbitration and the ultimate result would be the same." (Emphasis Supplied).

The agreement to arbitrate between Appellant and Appellee (Appellant's Appendix, pages 8A and 9A) does not conform to the Act in several respects. The agreement fails to specify that judgment of any circuit court may be rendered upon an award made pursuant to the agreement. As recognized in *Tellkamp v. Wolverine Mutual Insurance Co.*, 219 Mich App 231; 556 NW2d 504 (1996):

> "The Michigan arbitration statute provides that an agreement to settle a controversy by arbitration under the statute is valid, enforceable, and irrevocable if the agreement provides that a circuit court can render judgment on the arbitration award. MCL § 600.5001; MSA. § 27A.5001. While the statute allows parties to agree that an arbitration award will be enforceable, allowing them to enter into so-called "statutory" arbitration, the statute has been interpreted as requiring the parties to "clearly evidence that intent by a contract provision for entry of judgment upon the award by the circuit court." E.E. Tripp *Excavating Contractor, Inc. v. Jackson Co.*, 60 Mich App 221, 237, 230 NW2d 556 (1975)…" (Emphasis Supplied).

In addition, the agreement between Appellant and Appellee fails to reference that it is governed by the Act or, in the alternate, that it shall be conducted in accordance with the rules of the supreme court.

In that the agreement between the parties fails to contain the required criteria of the Act, the agreement is not irrevocable. As set forth in greater detail infra, an arbitration agreement that fails to comply with the provisions of the Act is subject to unilateral revocation under the principles of common law arbitration.

To be considered statutory arbitration, the arbitration agreement must contain language affording the parties the opportunity to have a judgment entered on the ultimate award. An arbitration agreement that leaves the parties in a position to only bring a subsequent suit for breach of contract is not sufficient to satisfy the statutory requirement "that a circuit court can render judgment on the arbitration award". If the parties want their arbitration to be governed by the Act, their arbitration agreement must provide for a circuit court to enter a judgment on the arbitration award.

Appellants do not argue against the numerous appellate decisions that address and define the requirements necessary

for a statutory versus a common law arbitration agreement. In fact, Appellants state in their brief that "In summary, according to appellate decisions, an arbitration agreement that contains language for the entry of a circuit court judgment is a statutory arbitration agreement. If that language is absent, the arbitration agreement is a common law arbitration agreement." (Appellants' Brief, Page 6)

Appellants then go on to argue that the Act does not require that the arbitration agreement contain language that a judgment of any circuit court may be rendered upon the award. Appellants take two approaches to get around the provisions of the Act. First, Appellants argue that Section 5001(1) of the Act provides only that the parties "may" agree in their arbitration agreement that a judgment of any circuit court shall be rendered upon the award. Secondly, Appellants argue that MCR 3.602 (I) and (L) provide for a method for entry of a judgment upon the award.

Both of Appellants' agreements are without merit. Section 5001(1) of the Act must be read, in pari materia, with Section 5001(2) of the Act. Although Section 5001(1) provides that the parties may or may not provide for circuit court confirmation and enforcement of an arbitration award, Section 5001(2) provides that in order to make the arbitration

NW2d 181 (1996), and MCL 600.5001 et seq.; MSA 27A.5001 et seq.).

The Court further ruled that ". . .[u]nder the 'unilateral revocation rule,' when the agreement is for common-law arbitration, either party may unilaterally revoke the arbitration agreement at any time before the announcement of an award, regardless of which party initiated the arbitration." *Hetrick* at 269, relying on *Tony Andreski, Inc. v. Ski Brule, Inc.*, 190 Mich App 343, 347-348, 475 NW2d 469 (1991).

In *E.E. Tripp, supra* the Court held that, ". . . common-law arbitration agreements could be revoked or repudiated at will by a party any time prior to announcement of the award." *Id.* at 243, 244. Plaintiff contractor brought suit against Defendant county seeking confirmation of arbitration award as a statutory arbitration and alternatively as a common-law arbitration, after Defendant refused to participate in arbitration and failed to satisfy the award. The Court affirmed the trial court's order in favor of Defendant, denying confirmation of the award as a statutory arbitration agreement. The Court stated that an agreement for statutory arbitration, which is only revocable by mutual consent, must be clearly evidenced by the use of language from the enabling

statute. *E.E. Tripp*, at 236. The Court held that in order for parties ". . . to avail themselves of statutory arbitration provisions, parties to a contract *must clearly evidence that intent by a contract provision for entry of judgment upon the award by a circuit court.*" *E.E. Tripp*, at 237.

The involved Stipulation and Order is clearly a common-law arbitration agreement. The provisions contained therein merely provide for the settlement of controversies by arbitration and provides no stipulation that the parties thereby consent to the entry of judgment upon an award.

The parties to this action agreed to submit to arbitration under the belief that Ms. Papp's injuries were confined to her shoulder, her ankle and her severe headaches. The parties were under the mistaken belief that they knew precisely what the injuries sustained by Ms. Papp entailed. It was clear that her injuries were the result of Appellants' negligence. Liability was a clear issue in this case. But for the newly discovered findings regarding Ms. Papp's herniated disc, Ms. Papp would have agreed to submit this matter to arbitration under the parties' arrangement. Ms. Papp, age 30, must now take into consideration the fact that she faces another surgery, rehabilitative procedures and

costly medical bills, all due to Appellants' negligence. As such, Appellee, Cynthia Papp, exercised her unilateral right to revoke arbitration when she informed Appellants and chosen arbitrators that Arbitration would not be taking place. (Appellants' Appendix, pages 13A-21A)

*Tellkamp, supra,* supports the Court of Appeals' ruling and stands for the proposition that statutory arbitration agreements, in accordance with the Act, must contain language which clearly evidences intent by a contract provision for entry of judgment upon the award by the circuit court. If such language is not present, it is a common law arbitration agreement. *Tellkamp, at 237*, quoting *E.E. Tripp Excavating Contractor, Inc. v. Jackson Co.*, 60 Mich App 221, 237; 230 NW2d 556 (1975).

Clearly, ". . . if the arbitration agreement does not provide 'that judgment shall be entered in accordance with the arbitrators' decision,' the contract involves common-law arbitration." *Beattie v. Autostyle Plastics, Inc.*, 217 Mich App 572, 578; 552 NW2d 181 (1996), citing MCL 600.5001 et seq.; MSA 27A.5001 et seq.

Appellants incorrectly state that the Stipulation and Order ". . .meets the case law definition of statutory arbitration agreements because it contains language providing

for the entry of a circuit court judgment". This is simply not the case. The relevant language of Stipulation and Order states, in pertinent part, as follow:

> 1. High/Low Agreement. The parties agree to limit their exposure in arbitration according to a "high/low arrangement." This means that if the arbitrators award less than $20,000, the plaintiff is entitled to $20,000. If the arbitrators award a figure between $20,000 and $40,000, the plaintiff is entitled to that figure. If the arbitrators award more than $40,000, the plaintiff is entitled to $40,000 and no more.
>
> 2. Dismissal of Circuit Court Action. Following the arbitration hearing and payment of the award, the parties will enter into a Stipulation and Order of Dismissal with Prejudice.

(Appellants' Appendix, pages 8A and 9A)

Appellants argue that the Stipulation and Order orders Appellants to pay the amount of the award to the Appellee once the arbitrators establish damages. This is incorrect. The language merely states, "plaintiff is entitled." Appellants' argument that they are ordered to pay what "plaintiff is entitled to" fails due to the fact that there is no language contained in the parties' agreement which supports any type of directive from the circuit court compelling Appellants to pay Appellee upon the arbitrators' award.

Further, Appellants argue that the language entitled "Dismissal of Circuit Court Action" is an express agreement that a judgment will be entered upon the arbitrator's award.

This, too, is incorrect. The language simply does not support a finding that the agreement provides that a judgment of any circuit court shall be rendered upon the award. To the contrary, payment of the award must occur first before the parties enter into a Stipulation and Order of Dismissal with Prejudice. There is no language compelling Appellants to pay an award once it has been made.

Further, if this matter had been arbitrated and an award rendered within the perimeters of the high/low arrangement, the circuit court would be without authority to enter a judgment on the award. Rather, if the Appellants refused to pay, Appellee would be left to seeking a separate breach of contract action. This was the issue presented to the court in *Barden v. Hunt Transport,* _Mich App_, (1997) Docket No. 193511, unpublished.[1] The facts in *Barden* are identical to the facts in the instant case. *Barden* is an automobile negligence case that had been pending for a year and a half when the parties agreed to dismiss the action and submit their dispute to binding arbitration with a high/low agreement. Pursuant to the stipulation of the parties, the court entered an order referring the matter to arbitration and dismissing the action with prejudice. The arbitration panel issued a majority

decision award of $300,000, the maximum limit of the high/low agreement. Subsequent to the award and after a hearing, the trial court entered an order reinstating the case and a judgment in plaintiff's favor in the amount of the $300,000 award. Defendant contended, on appeal, that the trial court erred in entering a judgment when it did not have jurisdiction to render judgment on the arbitration award and the Court of Appeals agreed. The Court of Appeals in *Barden* stated:

> "In statutory arbitration, the circuit court has jurisdiction to render judgment on an award. *MCL 600.5025; MSA 27A.5025*. By contrast, a common law arbitration award may only be enforced through a separate contract action. *Gibson v. Burrows,* 41 Mich. 713, 715-716; 3 NW 200 (1879); *McGunn v. Hanlin,* 29 Mich. 476, 480 (1874); see, also, *4 Am Jur 2d,* Alternative Dispute Resolution, § 218, p 247. Here, the parties did not execute a written arbitration agreement, but rather obtained a court order referring their dispute to arbitration. Because the order submitting the parties' dispute to arbitration did not provide that judgment would be entered in accordance with the arbitrators' decision, this case involves common law arbitration. *Beattie v. Autostyle Plastics, Inc,* 217 Mich.App 572, 578; 552 NW2d 181 (1996); see, also *Brucker v. McKinlay Transport, Inc,* 454 Mich. 8, 14-15; 557 NW2d 536 (1997). Accordingly, the trial court did not have jurisdiction to enforce the arbitration award because plaintiff did not file a separate contract action, but rather simply moved in the circuit court for entry of judgment on the arbitration award."

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[1]Pursuant to MCR 7.215(C)(1) and MCR 7.212(C)(7) the unpublished opinion is reproduced and attached in the addendum to Appellee's Brief.

Appellants argue that, pursuant to the Stipulation and Order, once the arbitrators establish the amount owed to Appellee, the Appellants are ordered to pay it. Like *Barden*, this is simply not the case.

The Stipulation and Order neither provides for the entry of a circuit court judgment nor meets the Act's criteria for a statutory arbitration agreement as claimed by Appellants. No two arbitrations agreements are totally identical and each one varies, to some degree, in its respective terms and conditions. However, the cited case law is consistent in its holdings that in order for an agreement to be a statutory arbitration agreement, it must contain language that a judgment of any circuit court shall be rendered on the award. See *Tripp*, *Beattie*, *Hetrick*, and *Tellkamp*, supra. *Gordon Sel-Way v Spence Brothers, Inc.*, 438 Mich 488; 475 NW2d 704(1991).

The fact that the parties utilized a Stipulation and Order is of no consequence. It serves merely as the written agreement. Although any court order is enforceable, the order is only enforceable to the extent that it is violated. No where in the Stipulation and Order is there an obligation on the part of the Appellants to pay the arbitration award. Likewise, there is no provision that the circuit court shall render a judgment on the award. See *Barden, supra*. It is

worthy to note that although the trial court denied the Appellee's motion to set aside the Stipulation and Order (Appellant's Appendix, pages 22A and 23A) neither the trial court, sua sponte, nor the Appellant, on motion, sought to enforce the Order by way of contempt proceedings or otherwise.

The Stipulation and Order involved herein is clearly a common-law arbitration agreement. As such, Appellee, Cynthia A. Papp, validly exercised her right to revoke said agreement.

## III

## COMMON LAW ARBITRATION AGREEMENTS SHOULD REMAIN REVOCABLE

### A. Standard of Review.

The elements required to establish either a legally sufficient statutory arbitration agreement or a legally sufficient common law arbitration agreement are questions of law, which are reviewed on appeal by this Court de novo. *Cardinal Mooney High School v. Michigan High School Athletic Ass'n*, 437 Mich 75,80; 467 NW2d 21 (1991). To establish the applicable language criteria for both statutory and common law arbitration agreements, statutory construction is required and this also is reviewed on appeal by this Court de novo. *Cruz v. State*

*Farm Mutual Automobile Insurance Co.*, 466 Mich 588, 594; 648 NW2d 591 (2002).

**B. Analysis and Argument.**

The unilateral revocation of common law arbitration agreements should not be abolished. In order to abolish the doctrine of unilateral revocation, it would be almost incumbent on this Court to totally abolish common law arbitration. Michigan law is well settled on the matter that statutory arbitration and common law arbitration are co-existent in this state. *Frolich, supra.* There are two sets of rules, one governing statutory arbitration and the other governing common law arbitration. Pursuant to MCL 600.5021, statutory arbitration governed by the Act is to be conducted in accordance with the rules of this Court. Further, the parties to an arbitration agreement can only invoke the rules of this Court, set forth in MCR 3.602, if the arbitration agreement provides for arbitration pursuant to the Act, or, in the alternative, provides that the arbitration proceedings shall be governed by the Michigan Court Rules.

MCR 3.602(A) specifically states that "This rule governs statutory arbitration under MCL 600.5001 through 600.5035. . .."

In statutory arbitration, the arbitrator's authority is governed by the Act and the applicable Michigan Court Rules. In common law arbitration, the arbitrator's authority is governed solely by the terms and conditions of the arbitration agreement and the applicable case law interpreting common law arbitration agreements.

Common law arbitration agreements are revocable, at the will of all parties, until such time as the arbitrator(s) has rendered the award. Pursuant to the Act, statutory arbitration agreements are irrevocable. MCL 600.5001(2); MCL 600.5011.

Common law arbitration is not subject to as strict a standard of review as is statutory arbitration. *Emmons v Lake States Ins. Co.*, 193 Mich App 460, 466; 484 NW2d 712 (1992). Rather, judicial review is limited to instances of bad faith, fraud, misconduct or manifest mistake. *Emmons, supra.* A common law arbitration award will be upheld absent (1) fraud on the part of the arbitrator; (2) fraud or misconduct of the parties affecting the result; (3) gross unfairness on the conduct of the proceedings; (4) want of jurisdiction in the arbitrator; (5) violation of public policy; (6) want of the entirety of the award. *Tripp, supra.*

Unlike statutory arbitration, where a majority of the arbitration panel may render a final award unless the concurrence of all arbitrators is especially required by the arbitration agreement (MCR 3.602(H)), a common law arbitration award must be the unanimous determination of the arbitrators unless the submission indicates otherwise. *Flint P. Smith Building Co. v. Industrial Savings Bank,* 218 Mich 374, 380; 188 NW 350 (1922). In *Port Huron School District v. Port Huron Education Association,* 426 Mich 143; 393 NW2d 811 (1986) this Court in dealing with a common law arbitration agreement stated that "a court may not review an arbitrators factual finding or decision on the merits."

Again, to make common law arbitration agreements irrevocable would, without question, have the indirect, if not the direct, effect of entirely eliminating common law arbitration. As this court stated in the case of *Pohutski v. City of Allen Park,* 465 Mich 675; 641 NW2d 219(2002):

> "We do not lightly overrule precedent. Stare decisis is generally " 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' " *Robinson, supra* at 463, 613 N.W.2d 307 quoting

*Hohn v. United States,* 524 U.S. 236, 251, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). Before we overrule a prior decision, we must be convinced "not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it." *McEvoy v. Sault Ste Marie,* 136 Mich. 172, 178, 98 N.W. 1006 (1904)."

" In *Robinson, supra* at 464, 613 N.W.2d 307 we set forth four factors that we consider before overruling a prior decision: 1) whether the earlier case was wrongly decided, 2) whether the decision defies "practical workability," 3) whether reliance interests would work an undue hardship, and 4) whether changes in the law or facts no longer justify the questioned decision. In considering the reliance interest, we consider "whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Id.* at 466, 613 N.W.2d 307..."

The case law in Michigan is replete with decisions that stand for the proposition that common law arbitration agreements are revocable by any party until the award is rendered unless the agreement specifically provides that a circuit court shall enter judgment on the award. There is substantial justification for reaffirming this rule of law. It is submitted that the current case law has not been wrongly decided and does not defy practical workability. In fact, for the reasons

previously stated, if this court were to decide that common law arbitration agreements should be irrevocable it would create havoc in the entire area of common law arbitration. Without the definitive rules that govern statutory arbitration, common law arbitration would be placed in a state of total confusion. There would be tremendous negative impact on the part of parties to enter into future common law arbitration arrangements and there would be total disorder in those matters that are already bound to a common law arbitration arrangement. One only has to think of all the real estate agreements, stock or asset purchase agreements, sale of goods and services agreements and numerous other types of consumer sale related contracts that have entered into over the years and that are still viable today that would be impacted by a decision to make common law arbitration agreements irrevocable. It must be remembered that under today's state of the law, if a party to a common law arbitration agreement is not satisfied that the procedures being follow are fair and equitable, the party can unilaterally revoke arbitration at any time before the award is rendered. This right is sometimes the only protection that a party has to the arbitration process.

Again, without the benefit of properly crafted rules governing common law arbitration, it is difficult to imagine the complete rescission of a party's major, and sometime only, defense to a process that is being misused or abused to his or her detriment.

It is a decision to make common law arbitration agreement irrevocable that defies "practical workability." For the same reasons, there has been no change in the law or the facts that would justify a decision of this Court to make common law arbitration agreements irrevocable.

Should this court decide to overrule the long standing common law which provides that common law arbitration is unilaterally revocable by either party at any time prior to the arbitrator's award, it would, without question, have significant negative impact on the existing common law arbitration agreement and the contract rights of the parties to those agreements, including the Appellee. These agreements to arbitrate a future claim that might arise and agreements to arbitrate a current controversy have been entered into with the understanding the unilateral revocation is avail to the

party at any time prior to the issuance of an award. As this court stated in *Pohutski, supra, at 696* (Citations omitted):

> "...'This Court has overruled prior precedent many times in the past. In each such instance the Court must take into account the total situation confronting it and seek a just and realistic solution of the problems occasioned by the change.'"

> "Although the general rule is that judicial decisions are given full retroactive effect, *Hyde v. Univ. of Michigan Bd. of Regents,* 426 Mich. 223, 240, 393 N.W.2d 847 (1986), a more flexible approach is warranted where injustice might result from full retroactivity. *Lindsey v. Harper Hosp.,* 455 Mich. 56, 68, 564 N.W.2d 861 (1997). For example, a holding that overrules settled precedent may properly be limited to prospective application. *Id.* Moreover, the federal constitution does not preclude state courts from determining whether their own law-changing decisions are applied prospectively or retroactively. *Great Northern R Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 364-365, 53 S.Ct. 145, 77 L.Ed. 360 (1932)."

> "This Court adopted from *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), three factors to be weighed in determining when a decision should not have retroactive application. Those factors are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *People v. Hampton,* 384 Mich. 669, 674, 187 N.W.2d 404 (1971). In the civil context, a plurality of this Court noted that *Chevron Oil v. Huson,* 404 U.S. 97,

> 106-107, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), recognized an additional threshold question whether the decision clearly established a new principle of law. *Riley v. Northland Geriatric Center (After Remand)*, 431 Mich. 632, 645-646, 433 N.W.2d 787 (1988) (GRIFFIN,J.)"

Like *Pohutski*, application of the three part test must lead to the conclusion that prospective application is appropriate if this court were to conclude that common law arbitration agreement are irrevocable. First, the only purpose in finding common law arbitration agreements irrevocable would be to correct this court's perception of an error in the existing case law applicable to unilaterally revocability. Second, as noted above, there has been extensive reliance on the existing case law that common law arbitration agreements are unilaterally revocable. Thirdly, if this court were to conclude that common law arbitration agreements are irrevocable, prospective application would minimize the effect of any such decision. Further, it would give parties to future such agreements the "red light" until the Legislature can address this issue and enact appropriate legislation.

For the reason set forth above, common law arbitration agreements should remain unilaterally revocation and this court should issue its opinion

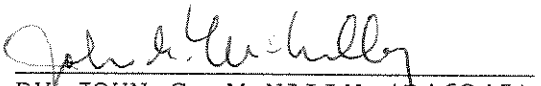
accordingly. However, should this court decide that common law arbitration agreements are to be irrevocable, then, and in that event, any such decision should be afforded prospective application only.

**RELIEF REQUESTED**

For the reasons set forth above, Appellee, Cynthia A. Papp, respectfully requests that this Honorable Court affirm the January 29, 2002 Court of Appeals' Order.

Respectfully submitted,

LAW OFFICES OF McNALLY, YOUNG & MISKO, P.C.



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(Appeal from the Court of Appeals)

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| | Case No. 99-08377-NI |
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ADDENDUM TO
BRIEF ON APPEAL
PLAINTIFF/APPELLEE CYNTHIA A. PAPP

Court of Appeals of Michigan.
Fred Robert BARDEN, Plaintiff-Appellee,
v.
J.B. HUNT TRANSPORT, INC. and Mark E. Weber, Defendants-Appellants.
No. 193511.
Sept. 5, 1997.

Before: WHITE, P.J., and BANDSTRA and SMOLENSKI, JJ.

UNPUBLISHED

PER CURIAM.

*1 In this automobile negligence case, defendants appeal by right from a judgment giving effect to an arbitration award. We reverse.

Plaintiff commenced this action to recover for injuries suffered when his car collided with a truck owned by defendant J.B. Hunt and driven by defendant Weber. After a year and a half of discovery, the parties agreed to dismiss the action and submit their dispute to binding arbitration subject to a high/low agreement. The trial court then entered an order referring the matter to arbitration and dismissing the action with prejudice. On February 7, 1996, the three-person arbitration panel issued a majority decision awarding plaintiff $300,000. Plaintiff filed a motion in circuit court two days later for entry of a judgment giving effect to the award. After a hearing, the trial court entered both an order reinstating the case and a judgment in favor of plaintiff in the amount of $300,000.

Defendants contend that the trial court erred in entering a judgment when it did not have jurisdiction to render judgment on the arbitration award. We agree. Whether a court has subject matter jurisdiction is a question of law that this Court reviews de novo. *Bruwer v. Oaks (On Remand)*, 218 Mich.App 392, 395; 554 NW2d 345 (1996). Michigan recognizes both statutory and common law arbitration. *F J Siller & Co v. City of Hart*, 400 Mich. 578, 581; 255 NW2d 347 (1977). In statutory arbitration, the circuit court has jurisdiction to render judgment on an award. MCL 600.5025; MSA 27A.5025. By contrast, a common law arbitration award may only be enforced through a separate contract action. *Gibson v. Burrows*, 41 Mich. 713, 715-716; 3 NW 200 (1879); *McGunn v. Hanlin*, 29 Mich. 476, 480 (1874); see, also, 4 Am Jur 2d, Alternative Dispute Resolution, § 218, p 247. Here, the parties did not execute a written arbitration agreement, but rather obtained a court order referring their dispute to arbitration. Because the order submitting the parties' dispute to arbitration did not provide that judgment would be entered in accordance with the arbitrators' decision, this case involves common law arbitration. *Beattie v. Autostyle Plastics, Inc*, 217 Mich.App 572, 578; 552 NW2d 181 (1996); see, also *Brucker v. McKinlay Transport, Inc*, 454 Mich. 8, 14-15; 557 NW2d 536 (1997). Accordingly, the trial court did not have jurisdiction to enforce the arbitration award because plaintiff did not file a separate contract action, but rather

simply moved in the circuit court for entry of judgment on the arbitration award.

Although our decision with respect to the first issue disposes of this case, we address defendants' second argument in an effort to guide the parties and conserve judicial resources. Defendants contend that the trial court erred in entering judgment on the arbitrators' majority decision. We agree. This Court reviews questions of law de novo. *Duggan v. Clare Co Bd of Comm'rs*, 203 Mich.App 573, 575; 513 NW2d 192 (1994). Unlike in statutory arbitration, where a majority of the arbitration panel may render a final award unless the concurrence of all the arbitrators is expressly required by the agreement to submit to arbitration, MCR 3.602(H), a common law arbitration award must be the unanimous determination of the arbitrators unless the submission indicates otherwise, see *Flint P Smith Building Co v. Industrial Savings Bank*, 218 Mich. 374, 380; 188 NW 350 (1922); see, also, 4 Am Jur 2d, Alternative Dispute Resolution, § 197, pp 223-224. In this case, the submission order does not provide for a majority decision, and there is no evidence suggesting that the parties made a mistake in preparing the document. Cf. *M'Curdy v. Daniell*, 135 Mich. 55; 97 NW 52 (1903). Further, the arbitrators clearly indicated in their award that they did not consider it to be binding in the absence of unanimity. The trial court erred in enforcing the arbitrators' decision.

We reverse.

WHITE, J. (concurring in part and dissenting in part).

I dissent from the majority's conclusion that the circuit court did not have jurisdiction to enforce the arbitration award because plaintiff did not file a separate contract action, but simply moved in the circuit court for entry of judgment on the award. On the date set for trial, after earlier settlement efforts had proved unsuccessful, the parties agreed to dismiss the pending circuit court action and refer the matter to binding arbitration before three arbitrators, with a high-low agreement. The agreement was placed on the record before the court. The question whether the dismissal of the circuit court action would be without prejudice and with plaintiff reserving the right to file a motion for reinstatement should the need arise was resolved with the court stating:

Well, let me suggest we make it a dismissal with prejudice and without costs subject to being reopen[sic] for good cause in the event that something unforeseen happens with regard to the arbitration. [FN1]

FN1. The entire colloquy was as follows:

MR. GELLER: Your Honor, I believe we have an agreement. Eric Geller, on behalf of the defendant. It is my understanding, and brother counsel, Tim Christensen is here to correct me if I am wrong, we are going to enter into a dismissal of the circuit court action. And we are going to agree to binding arbitration with a three-member panel, three attorneys with a high- low agreement of $40,000 low, $300,000 high. We hope to have that accomplished within 30 to 45 days.

MR. CHRISTENSEN: Right. There is going to be every good faith effort made at trying to get that done within the time limit prescribed, and I suggested that the dismissal be without prejudice and without costs. And that we reserve our right to file a motion to reinstate should that need
arise. We hope that it doesn't.

MR. GELLER: With the only caveat that the dismissal without prejudice will automatically become a dismissal with prejudice and without costs once the binding arbitration takes place or commences.

THE COURT: Well, let me suggest we make it a dismissal with prejudice and without cost subject to being reopen for good cause in the event that something unforeseen happens with regard to the arbitration.

MR. CHRISTENSEN: Okay.

MR. GELLER: I have no problem.

MR. CHRISTENSEN: I just don't want, if something, and I don't anticipate it happening but if it does, I want to be able, I can get back into court.

MR. GELLER: If he doesn't have his agreement within forty-five days, he can petition the court and the court can do as it sees fit.

THE COURT: Fine. And if you show good cause, we will open it up again. If, as we indicated in chambers there is only a tiny time delay necessary to bring this to a conclusion through the arbitrators, then I wouldn't consider that good cause but for some reason this process falls apart and I can't imagine it happening, but if it does and it doesn't look like it is going to reach a speedy conclusion for some reason, then you will show good cause and we will open it up.
MR. GELLER: Thank you, Your Honor.

MR. CHRISTENSEN: Thank you, Judge.

(Matter concluded.)

Under these circumstances, the trial court correctly concluded that it had jurisdiction to reinstate the case and to enforce the arbitration agreement, including by entering judgment on the award. Where the parties to a pending circuit court action expressly agree to binding arbitration with the understanding that they can return to the court if something unforeseen happens, it is implicit, if not explicit, that the agreement contemplates that the court may enter judgment on the award, if necessary. On the issue of unanimity, I conclude that where the arbitrators did not understand themselves to be rendering a binding award, the case should be resubmitted to the panel.